Supreme Court, U.S.
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No. 88-666

In The
Supreme Court of the United States
October Term, 1988

ERNESTINE FORREST,

Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION, DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORPORATION, WHITE CORPORATION, RED CORPORATION, ARMAND HAMMER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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OCCIDENTAL PETROLEUM CORPORATION, DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORPORATION, WHITE CORPORATION, RED CORPORATION, ARMAND HAMMER,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

The BRIEF IN OPPOSITION filed by Respondents is some of the best evidence of why there should be a reversal and remand to the District Court judge to determine the correctness of the District Court's February 28, 1986 Order dismissing the action pursuant to Rule 35 of

the Federal Rules of Civil Procedure. This Order is included in Appendix B of the Petition for Writ of Certiorari at page 19a.

The February 28, 1986 Order, as well as the District Court Docket of Proceedings included at Appendix D of the Petition for Writ of Certiorari at page 29a, clearly establish that on November 20, 1984 Petitioner filed a complaint against Respondents in the United States District Court, Central District of California, with the case assigned to Judge Robert Takasugi. Nevertheless, Respondents argue to the United States Supreme Court in their Respondent's Brief In Opposition (on page three of their CORRECTED STATEMENT OF THE CASE) that it was actually November 29, 1984 when Petitioner filed her complaint. Respondents then continue throughout their RESPONDENTS' BRIEF IN OPPOSITION, to do what they have *thus far,* done successfully before the United States Court of Appeals for the Ninth Circuit, the courts of the State of California, and in all other forums in which they have appeared with respect to this case. They misstate and distort the facts, leaving out critical information, in continuance of their efforts to obtain *windfall* dismissals of the valid claims of Respondent against them, with no concern to the violation of their ethical responsibilities to the Courts as licensed attorneys.

THE BRIEF IN OPPOSITION clearly establishes the need to remand to the District Court where there can be the appropriate weighing of the evidence and determination by the District Court judge of the truth or falsity of allegations made. MOREOVER, as *Appendix A to this Petitioner's Reply Brief evidences,* there has been a clear violation of the equal protection of the laws envisioned by

the United States Constitution in Article XIV, Section 1, by the dismissal of this case. The aforementional Appendix A is an Order issued by Judge Robert Takasugi in another federal court proceeding between Petitioner and Respondents in which he warns Petitioner that the 120-day period of Rule 4(j) of the Federal Rules of Civil Procedure is about to have run so that service of process must quickly be completed. Alternatively, Rule 4(j), a recent procedural innovation in the federal courts which has not been fully considered by the United States Supreme Court, will be applied to result in a dismissal.

NO WARNING was provided by Judge Takasugi with respect to the running of the 120-day period in the action now before the United States Supreme Court. No notice was even provided when the 120-day period had expired and the action was subject to dismissal under Rule 4(j), although Rule 4(j) requires such notice. Moreover, the case law evidences that courts have provided repeated notice to the plaintiff before invoking the harsh results of Rule 4(j) or similar statutes, dismissing only after a failure to respond to such. See e.g., *Whale v. United States of America,* 792 F.2d 951, 952 (9th Cir. 1986), *Kung v. Fom Investment Corporation,* 563 F.2d 1316, 1318 (9th Cir. 1977). The instant case was not treated procedurally in accordance with the legal requirements and/or established practice.

I. THE COURT OF APPEALS WAS CORRECT IN ITS ORIGINAL DETERMINATION TO REVERSE AND REMAND, AS REFLECTED IN THE MEMORANDUM DECISION, FILED JANUARY 21, 1988.

A. THE UNITED STATES SUPREME COURT HAS NOT ADDRESSED WHAT IS GOOD CAUSE UNDER RULE 4(J) OF THE FEDERAL RULES OF CIVIL PROCEDURE BUT OUTSTANDING AUTHORITY DOES NOT SUGGEST THAT GOOD CAUSE CANNOT BE ESTABLISHED IN THIS CASE.

In *Wei v. State of Hawaii,* 763 F.2d 370, 372 (9th Cir. 1985), cited by Respondents in their Brief in Opposition, the Court of Appeals for the Ninth Circuit recognized that:

> The harsh sanction of Rule 4(j) is appropriate to those cases in which non-service was the result of mere inadvertence . . . Rule 4(j) is aimed at 'inadvertent or heedless non-service. . . .'

The Court of Appeals also recognized that where a person is prevented from effecting service by factors beyond his control, Rule 4(j) should not be applied.

In the instant case, being able to weigh the evidence and determine the truth or falsity of allegations made, this district court judge should have made any Rule 4(j) determinations as envisioned by Congress. *King v. Fom Investment Corporation,* 583 F.2d 1316, 1318 (1977), establishes that litigants should not be bound by the conduct of their attorneys where there are egregious circumstances. The district court judge should have made any determinations regarding the effect of petitioner's abandonment by counsel under the financial and other circumstances and the effect of the evasion of service of process by Respon-

dents when asked by such counsel previous to abandonment whether they would accept service of process. Respondents and their counsel ignored the attorney, Robert Bezemek, Esq. and now seek to argue that service of process could have easily been completed by serving the very attorneys who refused to respond to a request on Petitioner's behalf, that they accept service of process.

B. THE DISTRICT COURT JUDGE IS THE ONLY PARTY WITH THE TIME AND AUTHORITY TO MAKE THE NECESSARY FINDINGS OF FACT, TO WEIGH THE EVIDENCE AND TO DETERMINE THE TRUTH OR FALSITY OF ALLEGATIONS AND RESPONDENTS SHOULD NOT BE ALLOWED TO USE MISSTATEMENTS AND DISTORTIONS NOT SUBJECT TO SUCH REVIEW TO SUPPORT THE HARSH SANCTION OF DISMISSAL.

Respondents' Brief In Opposition is replete with distortions and misstatements of fact which should be subject to review by the finder of fact.

For example, Respondents allege that petitioner, "along with several caucasion-male staff attorneys, were laid off pursuant to a reduction in work force," to suggest that there is no validity to the case of Petitioner. Respondents fail to state that the laid off attorneys were working for discontinued subsidiaries or subsidiaries such as Hooker Chemical Corporation which had been losing substantial monies from Love Canal. Even among these attorneys some were relocated within the corporation. There were no layoffs of professionals at corporate headquarters with respect to continued departments and operations such as tax, accounting, legal etc. As Petitioner was

the only female or minority attorney hired by Occidental Petroleum Corporation, layoffs of attorneys among these failing and discontinued operations could only be layoffs of caucasion males. Respondents also fail to refer to earlier and unsuccessful efforts to deprive Petitioner of her employment when she complained of the disparate treatment she received.

Respondents also misstate facts relating to state court proceedings which have been unsuccessful as Respondents have encouraged the abandonment of Petitioner by counsel she has hired, on three occasions. Respondents fail to reveal that, as affirmed by the Court of Appeals for the State of California, Petitioner's state court action was dismissed by the application of erroneous law by the trial court judge. Nevertheless, the dismissal has not yet been overturned as a petition to the California Supreme Court was not filed on a timely basis. See Appendix "B". The lower court decision was nevertheless in violation of clear California law.

Respondents refer to sanctions imposed by a trial court judge when Petitioner appealed a dismissal resulting when counsel she had hired failed to appear at the hearing. The sanctions were imposed by a trial court judge on the basis that he would not believe any of Petitioner's statements because she was proceeding against "one of the finest law firms in the country." This gratuitous statement of reasoning was included in the minute order. Although Respondents have used the $2400 in sanctions to work on forcing a sale of Petitioner's home through a writ of execution, the sanction and the dismissal are on appeal in the California Court of Appeals. Respon-

dents have also recently been successful in encouraging the withdrawal of the counsel for Petitioner in state discrimination proceedings, after receiving all of Petitioner's evidence from such counsel.

———o———

II CONCLUSION

Respondents use the appellate process where facts are not subject to full scrutiny to distort and misstate. Facts, particularly those supporting the harsh sanction of dismissal, should be based upon findings of fact after a weighing of the evidence and evaluation for truth or falsity. Respondents continue their distortions including regarding every facet of this case. FOR THE REASONS STATED IN THE PETITION FOR WRIT OF CERTIORARI, any dismissal of this case should only be in conformance with Rule 4(j) and based upon a truthful finding of the facts.

Respectfully submitted,

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*Counsel of Record

APPENDIX "A"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERNESTINE FORREST,	)	No. CV88-4450-RMT
Plaintiff(s),	)	ORDER FOR PLAINTIFF TO SHOW CAUSE
-v-	)	WHY THIS ACTION SHOULD NOT
OCCIDENTAL PETROLEUM CORP., et al	)	BE DISMISSED FOR LACK OF PROSECUTION
Defendant(s).	)	(Filed October 26, 1988)

This action was commenced on 7/22/88. As of this date, no proof of service, default or default judgment has been filed.

IT IS ORDERED that no later than 11/22/88, plaintiff shall file a statement showing cause why this action should not be dismissed for lack of prosecution pursuant to Local Rule 12 and FRCivP 4(j). Failure to file a statement shall result in immediate dismissal.

Dated: Oct. 26, 1988

/s/ Robert M. Takasuga,
ROBERT M. TAKASUGA,
United States District Judge

APPENDIX "B"

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OFFICE OF THE CLERK
SUPREME COURT OF CALIFORNIA
San Francisco, California
Laurence P. Gill, Clerk

July 21, 1988

Ms. Ernestine Forrest
P.O. Box 46013
Denver, Colorado 80201

Re: B025206—Forrest v. Occidental Petroleum Co. *et al.*

Dear Ms. Forrest:

Returned unfiled is your petition for review received this date. This court lost jurisdiction to act on any petition for review on July 18, 1988. (See Cal. Rules of Court 28(a) and 28(b).) The period of jurisdiction is the period of time provided by law within which this court may consider the relief requested in your petition for review. Also returned is your check in the amount of $200.

Very truly yours,
LAURENCE P. GILL
Clerk of the Supreme Court

/s/ John C. Rossi
By: John C. Rossi
Chief Deputy Clerk

JCR:kw

Enclosure